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Supreme Court, U.S.
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No. _____

# In the Supreme Court of the United States

ALISHA WYATT,

*Petitioner*,

v.

HUNT PLYWOOD COMPANY, INC., AND FEDERAL INSURANCE COMPANY,

*Respondents*.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether it was proper for the district and appellate courts to "parse" Petitioner's Title VII and state law claim of continuous supervisory sexual harassment into "discrete" segments, rather than analyze same as one continuous violation.

2. Whether an employer who fails to stop retaliation conduct by co-employees and supervisory personnel that the employer knew or should have known created an intolerable hostile environment for petitioner may be held liable for constructive discharge and retaliation.

3. Whether or not a constructive discharge claim may constitute a "tangible employment action" precluding assertion of the affirmative defense in intentional discrimination hostile environment claims.

4. Should petitioner be permitted to present to the jury the ultimate question as to respondents' liability for the intentional infliction of emotional distress, assault and battery caused by the outrageous conduct of having her pants pulled down by her immediate supervisor with the express approval of the successively higher supervisor, where the evidence demonstrates, beyond dispute, that the company had actual prior knowledge of the immediate supervisor's harassment and an actual opportunity to stop the harassment, but, as a matter of law, deliberately and unreasonably failed to do so.

5. Is Petitioner entitled to equitable relief where the facts, as a matter of law, clearly establish that the employer engaged in intentional discrimination.

## PARTIES TO THE PROCEEDING

### Petitioner

Petitioner is Alisha Wyatt, an individual citizen of the United States, residing in the Western District of Louisiana. Plaintiff has no corporate affiliations. Alisha Wyatt is the Plaintiff in the District Court, and was the Appellant in the Fifth Circuit Court of Appeals.

### Respondents

Hunt Plywood Company, Inc. is a corporation which may be publicly traded under it new name, Hunt's Forest Products, Inc. Petitioner does not know whether it was or is publicly traded at the time of filing of this petition. Federal Insurance Company is a corporation. Plaintiff does not know whether it is publicly traded or not. Petitioner is further unaware of any publicly held corporation owning ten (10%) percent or more of either corporation's stock. Respondents Hunt and Federal were Defendants in the District Court, and Appellees in the the Fifth Circuit Court of Appeals.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgments and rulings of the Fifth Circuit Court of Appeals and the United States District Court for the Western District of Louisiana in this case.

## OPINIONS BELOW

The Fifth Circuit opinion (App. B at 3a) is reported at 297 F.3d 405 (5th Cir. 2002). The District Court opinion (App. C at 26 a) is unreported.

## STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 5, 2002. The Court of Appeals entered orders denying timely petitions for rehearing and rehearing *en banc* on August 14, 2002 (App. A at 1 a).

The jurisdiction of this court is invoked pursuant to 28 U.S.C. Sec 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

A. 42 U.S.C. Sec. 2000e, et seq., Title VII of the Civil Rights Act of 1964, prohibiting discrimination in employment;

B. 42 U.S.C. Sec. 1981a, Civil Rights Act of 1991;

C. Louisiana Revised Statutes (L.R.S.) 23:1006, Louisiana's anti-discrimination statute prohibiting employment discrimination; and

D. Federal Rule of Civil Procedure, Rule 56.

42 U.S.C. 2000e (b), Section 701 of the Civil Rights Act of 1964, provides that "(t)he term 'employer' means a person...and any agent of such a person." 42 U.S.C. 2000e-2, Section 703 of the Civil Rights Act of 1964, provides in pertinent part that:

> ("(a) **Employer Practices.** It shall be an unlawful employment practice for an employer-
>
> (1) to...discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...sex...; or
>
> (2) to limit... or classify his employees...in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's sex..."
>
> "(m) **Motivations for practice.** Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that...sex...was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. 2000e-3(a), Section 704 of the Civil Rights Act of 1964, provides in pertinent part that:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. 2000e-5(g) (1), Section 704 of the Civil Rights Act provides in relevant part that:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to...any other equitable relief as the court deems appropriate."

42 U.S.C. 2000e-10(a), Section 711 of the Civil Rights Act of 1964 provides in pertinent part that:

> "Every employer...shall post and keep posted in conspicuous places upon its premises where notices to employees...are customarily posted a notice...setting forth information pertinent to the filing of a complaint."

The Civil Rights Act of 1991, codified at 42 U.S.C. 1981a(a)(1), provides: "In an action brought by a complaining

party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 [or 2000e-16]) against a respondent who engaged in unlawful discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704 or 717 of the act (42U.S.C. 2000e-2 or 2000e-3 [or 2000e-16]) and 1977 of the Revised Statutes (42 U.S.C. 1971), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)] from the respondent."

Rule 56(c) of the Federal Rules of Civil Procedure provides in relevant part that:

> "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Rule 56(d) of the Federal Rules of Civil Procedure provides that:

> "If on a motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by

> interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

Rule 56(e) of the Federal Rules of Civil Procedure provides in part that:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party."

La.R.S. 23:1006, which prohibits discrimination in employment on account of race, color, religion, sex, or national origin, states, in pertinent part, that:

> B. It shall be unlawful discrimination in employment for an employer to:

(1) Intentionally fail or refuse to hire, refer, discharge, or to otherwise intentionally discriminate against or in favor of an individual with respect to compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, or national origin; or

(2) Intentionally limit, segregate, or classify an employee in a way which would deprive an individual of employment opportunities, give favor or advantage to one individual over another, or otherwise adversely or favorably affect the status of an employee because of race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

Petitioner was subjected to continuous, regular and repeated offensive verbal and physical advances of a sexual nature by John Thompson (Thompson), the supervisor with immediate authority over her, from shortly after her hire in early March of 1994 until about November 12, 1994 when Thompson sneaked up behind her and intentionally pulled her pants down below her knees while she was feeding plywood into the superheater in the presence of her co-employees and her supervisor with successively higher authority over her and Thompson, Donald Ray Gorum (Gorum), thereby subjecting her to, or causing her, intentional outrage, ridicule, humiliation and severe emotional distress. Petitioner had repeatedly reported Thompson's behavior to Gorum, asking that he stop Thompson, in compliance with her verbal understanding of Hunt's policy and procedures for employment problems resolution. Gorum cautioned Thompson to leave her alone, to no avail, and also reported

Thompson's problematic harassment of Petitioner and another female co-employee up the chain of command to his superintendent, Buddy Rachal (Rachal), on "several" occasions, but Rachal nor any other manager for the company ever conducted an investigation or took any prompt corrective action to detect or stop Thompson's harassing behavior before Wyatt's pants were pulled down. Even after the pants incident, Rachal and Gorum impermissibly forced Petitioner to return to work for Thompson, who continued to intimidate and harass her to not report him (which was impossible since the plant supervisor and plant superintendent already actually knew).

From about July 1, 1994 until after Wyatt's pants were pulled down by Thompson with his approval on November 12, 1994, Gourm also sexually harassed Petitioner, made demands for sexual favors, offered her additional money if she complied, and threatened to make her job difficult in retaliation if she did not. Gorum fulfilled his threats of retaliation. In addition, Gorum made it clear to all his employees, including Petitioner, that he strictly forbid reporting any inappropriate conduct by Thompson or himself over his head to upper management, supporting an inference of a threat to retaliate. Gorum required all his employees who had a problem with Gorum's behavior to bring his or her complaint to Gorum, and Hunt Plywood never provided its employees with any information or training contrary to Gorum's interpretation of Hunt's policy.

After the pants incident, Gorum and Thompson continued to harass, threaten and intimidate Petitioner in an attempt to dissuade her from reporting to upper management what Thompson had actually done. However, the whole plant was discussing the matter within hours of its occurrence and there was no way Gorum could avoid eventually reporting the

matter up the chain of command to his superintendent, Rachal. Rachal called a meeting with Petitioner and Gorum on about November 14, 1994 and intimidated and frightened Petitioner by telling her it would be her fault if Thompson was fired. Rachal then permitted Gorum to reassign Petitioner to return to work under Thompson's immediate authority where Thompson continued to press Petitioner to not report the truth. As a result of his inability to convince Petitioner to not report Thompson's behavior, Rachal finally called the plant manager, Larry Manthei (Manthei), to report that there was a problem which required his presence and attention.

Manthei subsequently questioned a number of employees, including Petitioner, Gorum and Thompson about the pants incident, suspended Gorum and Thompson on November 15, 1994 to give the pretext appearance of prompt action, and subsequently issued a written report of the investigation concluding that Petitioner was, indeed, the victim of harassment, that forcing Petitioner to further work under Thompson was continued harassment and improper, and that Gorum and Thompson should be immediately terminated.

Hunt Plywood had a written harassment policy at the time of Wyatt's hire on March 8, 1994 which was effective for the period of June 1993 through June of 1994, and which Wyatt received. That policy required employees who believed they were the victims of sexual harassment to report to their supervisor, the Human Resources Department (without designating the appropriate contact person), the plant manager (who was absent from the plant during Wyatt's employment from March until some time in August of 1994), or the Company Vice-President (who had no office at the plant, and for whom there was provided no address or phone

number). This policy did not provide alternative procedures for discretely reporting harassment by supervisors or management, nor did it prohibit retaliation against employees who resorted to the policy for protection. Wyatt's deposition excerpts filed into the record as Defendants' Exhibit 1 (Dx 1) and Plaintiff's Exhibit 3 (Px 3) revealed that Wyatt never had the policy explained to her, never read the policy, and was told verbally at the time of hire that she should report any complaints she had to her supervisors, consistent with Gorum's deposition testimony that he expressly forbid his employees from taking complaints over his head, even if the complaints were about his inappropriate conduct. The employees were never trained or educated otherwise on Hunt's policy or procedure. (Hunt, made changes to its harassment policy effective for the period of June 1994 through June 1995, which were never promulgated or explained to Wyatt or other employees at Hunt.)

The demonstrative evidence adduced in support of Wyatt's motion for partial summary judgment further demonstrated that Hunt knew or should have known that Thompson and Gorum presented special risks of sexual harassment of female employees as a result of a formal EEOC complaint filed by Wyatt's female co-employee, Thelma Garrett. Finally, evidence was adduced in support of Wytatt's summary judgment motion that Thompson admitted to pulling down the pants of a female employee named Denean Dangerfield in the presence of all of her co-employees in a manner similar to his subsequent outrageous treatment of Wyatt on November 12, 1994.

Subsequent to the termination of Thompson and Gorum, Petitioner was caused to run a veritable gauntlet of severe or pervasive hostility, ridicule, threats, verbal abuse, isolation and deliberate indifference by male co-employees,

supervisors and managers in retaliation for engaging in such protected activities as obtaining legal counsel, participating in the investigation which led to termination of the two harassing supervisors and filing a formal discrimination complaint against Hunt with the EEOC. After notifying Manthei that she had contacted a lawyer about the sexual harassment by Thompson and Gorum, Manthei retaliated by telling Petitioner that management would no longer talk with her. This effectively left Petitioner without protection and required her to fend for herself in a bristling hostile environment of angry male co-employees and supervisors. Certain male co-employees constantly ridiculed Wyatt about the pants incident, inquiring whether she had panties on or not, threatening to testify falsely against her if she continued her EEOC complaint against respondent Hunt, and derogatorily referring to her as the "bitch with the million dollar ass," among other things. Upon reporting this inappropriate and distressing conduct to her supervisors to comply with the policy, Petitioner was told, essentially, that the supervisor's hands were tied and that she could solve the problem by just quitting her employment.

In February of 1995, Petitioner failed to show up for work as a result of being fed up with the unabated male co-employee and supervisory retaliation. A Hunt employee called her at home and asked why she did not show at work. After explaining the severe emotional pain she was suffering due to the continued severe and pervasive abuse she received from the male co-employees in retaliation for her protected activities and the unwillingness of the supervisors to do anything about it, she was asked to return to work and permit the plant manager, Manthei, an opportunity to investigate and correct the hostile retaliatory behavior. Wyatt agreed. To Wyatt's surprise, Manthei appeared at a regular shift meeting, spent about five (5) minutes telling employees, in general, that

Wyatt was complaining about their mistreatment of her, and instructing that the employees were to forget about the pants incident and the firing of Thompson and Gorum and go on with their work. Manthei did not explain Hunt's policies or procedures forbidding discrimination, or explain that Hunt prohibited discriminatory retaliation, and did not suggest to the offending male co-employees whom Wyatt had specifically named that further inappropriate retaliatory behavior against Wyatt would be punished accordingly. Manthei did not investigate Wyatt's complaints of hostile environment retaliation. Manthei did not explain how an aggrieved employee might discretely go around an offending supervisor or manager to make the company aware of inappropriate conduct, as he should have in light of his knowledge of the problem. Manthei never sought to visit with Wyatt and find out if she was faring well. Hunt failed miserably to detect, correct and discourage or appropriately respond to the subsequent continued hostile retaliation against Wyatt by male co-employees and supervisors.

The deposition excerpts of Mr. George Allen (Allen), Petitioner's [psycho-social therapist, substantiates that Petitioner suffered severe emotional distress and depression as a proximate cause of the sexual harassment by Thompson and Gorum culminating in her pants being pulled down, which was exacerbated by constant complaints concerning the retaliatory conduct and deliberate indifference of co-employees, supervisors and management in relation to her discrimination complaint with EEOC and participation in other protected activity. In addition, the medical reports from both the Respondents' and Petitioner's experts concluded that Petitioner suffered from post-traumatic stress disorder and depression as a result of having her pants pulled down. The depositions of these experts were not conducted prior to filing of the cross and opposing motions for summary judgment in

the district court, and have not been conducted to the date of filing of this petition for certiorari.

A female employee, Denean Dangerfield, testified that she personally witnessed the male employees regularly, openly and contemptuously harass Wyatt by calling her names, laughing at her, ridiculing her and making her cry after Manthei spoke at the meeting in February 1995, and before Wyatt quit her employment in May of 1995. Wyatt's complaints to the supervisors and the plant superintendent, Rachal, fell on insensitive and deaf ears. She was told by her supervisor that if she quit her employment her problems would be resolved. Most notably, the company subsequently required Wyatt to report her complaints directly to the superintendent, Rachal, although no other employee had to do so, and contrary to the reporting channels set out in its written policy. Shortly after receiving a dirty note which cruelly stated that if someone wanted a "good f—k call Alisha Wyatt" Petitioner admitted defeat and quit her employment with Hunt rather than go "bonkers" in May of 1995.

A female co-employee named Thelma Renee Coyle Garrett (Garrett) informed Wyatt that she had previously filed an EEOC complaint against Hunt since 1992 due to problems of sexual harassment by the same supervisors, Thompson and Gorum, and that Hunt had failed to do anything satisfactory to stop their harassment of female employees since that time. Hunt had never effectively enforced its sexual harassment policy although its plant manager, Manthei, and human resources director, George Keyes (Keyes) each testified in their depositions that the company had had such a written policy in place since the early 1980's. When Hunt's manager, Manthei, discovered that Garrett was closely communicating with Wyatt, he contrived to put an end to their friendly collaboration. One day Manthei called both Garrett and

Petitioner into his office, to discuss individually with each employee Manthei's contrived and untrue allegations that the each employee had come to him with complaints of being harassed by the other. Garrett had the presence of mind, as a result of past experiences with Manthei and Hunt's management, to conceal a tape recorder on her person to memorialize this event and conversation between her and Manthei. In her deposition excerpts filed into the record in support of Wyatt's motion for partial summary judgment, Garrett stated that Manthei's tactic to create an artificially induced hostile environment between the two female employees worked until Garrett decided to question Petitioner and find out why Petitioner had told Manthei that Garrett was harassing Petitioner. Upon finding that Petitioner had never made such complaint to Manthei or anyone else, but had likewise been untruthfully told by Manthei that Garrett had made similar complaints against her, the females realized what had happened and reconciled their friendly relationship. The Fifth Circuit panel determined that the discrete facts are undisputed in this case.

After obtaining a right to sue letter from EEOC, Wyatt instituted suit against respondent, Hunt, in the 39th Judicial District Court, Grant Parish, Louisiana under Louisiana's anti discrimination statutes, specifically R.S. 23:1006 for both quid pro quo and hostile environment sexual harassment, retaliation, constructive discharge, assault, battery and intentional infliction of emotional distress; also praying for a jury trial, all costs and a reasonable attorney's fee. Wyatt amended and supplemented her original petition, with leave of the state court, to include respondent Federal Insurance Company (Federal) as a necessary party, and to include substantive claims under Title VII and the Civil Rights Act of 1991 for sexual harassment, retaliation, constructive discharge, equitable relief, punitive damages and a jury trial.

The Respondents removed the case to the United States District Court for the Western District of Louisiana, Alexandria Division, with the honorable Felton A. Little presiding as judge. The district court, erroneously, made an interlocutory ruling that Petitioner was not entitled to a jury trial on her state law and Title VII claims for discrimination, retaliation, constructive discharge, assault, battery and intentional infliction of emotional distress without reference, even in a footnote, to any supporting legal precedent or authority. Respondents then sought summary judgment pursuant to F.R.C.P. 56, requesting, in essence, that the district court dismiss all of Wyatt's Title VII and state law discrimination and tort claims on the grounds of the affirmative defense and that Wyatt's fault was the sole cause of the discrimination and tortuous conduct. Wyatt responded by filing her own motion for partial summary judgment in opposition to respondent Hunt's motion on the issue of Hunt's *direct* or *vicarious* liability for supervisory sexual harassment of which it had actual knowledge but failed to adequately correct; further challenging Hunt's discrimination policies and procedures as inadequate, inappropriate and ineffective by pointing out substantial supporting evidence in the record. Wyatt also sought partial summary judgment in her favor on the issue of Hunt's liability for retaliatory constructive discharge as a result of Hunt's failure to investigate and halt, let alone stop, the severe and pervasive retaliatory co-employee and supervisory harassment and abuse, of which the company had actual knowledge, motivated as a result of Wyatt's engagement in protected activities, which led to her constructive discharge. Wyatt sought partial summary judgment on the issues of Hunt's direct or vicarious liability for assault, battery and intentional infliction of emotional distress under Louisiana's tort law, pointing out an abundance of undisputed supporting evidence that the general work environment itself was openly and outrageously oppressive to

females and pervaded with frequent penis dangling, slapping of women on the buttocks and chasing them throughout the plant, coupled with evidence that such behavior was witnessed, known and condoned by supervisors and management with no action taken by Hunt to stop or discourage such aberrant behavior.

The district court determined, as a matter of law, that the harassment of Wyatt by Thompson and Gorum from March to November 11, 1994 was sufficiently severe or pervasive to have altered a term or condition of Petitioner's employment, but refused to include the pants incident of November 12, 1994 in the hostile environment analysis. The district court then dismissed all of Petitioner's Title VII and state law discrimination and tort claims because it determined, *as a matter of law*, that Wyatt's failure to report Gorum's conduct barred her from recovering for Thompson's harassment which was aided by Gorum and the agency relationship Thompson shared with Hunt. The district court declined to analyze Wyatt's claim that she was constructively discharged due to supervisory, management and co-employee retaliation which created an actionably severe and pervasive hostile environment which Hunt failed to stop after actual notice and that such constructive discharge constitutes a "tangible employment action" for which there is no affirmative defense available to the employer. Finally, the district court improperly inferred facts against Wyatt, as the party opposing respondents' summary judgment motion, and made ultimate factual determinations, inconsistent with respondents' concessions, which could only be done by an impermissible determination of credibility and weighing of the evidence. The district court's decision unfairly deprived Wyatt of her right to a jury trial as provided by the Civil Rights Act of 1991 (and presumably protected by the Seventh Amendment to the United States Constitution.)

Wyatt appealed the district court's decision to the Fifth Circuit Court of Appeal.

The Fifth Circuit panel reversed the district court in part, ruling that Wyatt was entitled to a jury trial and that the district court's denial of jury trial subsequent to removal was not supported by any known law on the subject. The panel also held that Wyatt's conduct of repeatedly reporting the immediate supervisor's harassment to the successively higher supervisor as per Hunt's written policy was completely reasonable, and that Hunt's failure to stop Thompson before he pulled her pants down was unreasonable. The appellate court determined that Wyatt's statement of over 108 discrete material facts were not genuinely in dispute.

Nevertheless, the Fifth Circuit inexplicably and improperly contrived to "parse" the continuous sexual harassment hostile environment which occurred between March 1994 and November 14, 1994 into distinct or discrete segments solely as a result of Gorum's joining in the harassment in early July 1994. Rather than examine the hostile environment claim as one continuous act of unabated harassment of which the company had actual notice under the totality of circumstances rubric, as it should have in its de novo review, the Fifth Circuit panel, as did the district court, erroneously ignored the abundant admissible and undisputed evidence of record compellingly favorable to Wyatt on all of her Title VII and state law claims, and improperly weighed and made determinations of ultimate facts in favor of the moving party, Hunt, contrary to the law of summary judgment as jurisprudentially established under FRCP Rule 56, in this Court and among other circuits. The employer was exonerated by the panel from liability for its undisputed failure in its duty under Title VII and R. S. 23:1006 to implement adequate and appropriate policy and procedures

calculated to aid it in detecting, stopping and discouraging discrimination in the employment context. The result of this parsimonious analytical scheme was the dismissal of virtually all of Wyatt's substantiated discrimination and tort claims under a legal ruse calculated to provide an automatic safe harbor for employers who actually engage in discrimination, but who produce a written harassment policy, without consideration of the doctrine of unavoidable consequences, the impact other evidence bears on the ultimate questions of the reasonableness of Hunt's policy and procedures or Wyatt's justification for not reporting Gorum's conduct, and conflicting with the vicarious liability and negligence standards for supervisory harassment enunciated by this court and as applied by other circuits and the Louisiana Supreme Court.

In light of the district court and the Fifth Circuit panel's aversion to evaluating the period of harassment from March through November 15, 1994 as a single continuing violation with all reasonable inferences in Wyatt's favor, and the panel's decision to dismiss virtually all of her substantive Title VII and state law discrimination and tort claims despite finding the employer blameworthy as a matter of law, Wyatt timely petitioned for rehearing and rehearing en banc to address the disparity between the panel's decision in this case and previous cases before the Fifth Circuit and other circuits, the Louisiana Supreme Court and the United States Supreme Court, both of which were denied on August 14, 2002.

## REASONS FOR GRANTING THE PETITION

### 1. The Decisions of the Fifth Circuit And The District Court Conflicts with Decisions of This Court, Other Circuits and the Louisiana Supreme Court In Failing To Analyze The Hostile Environment Claim As One Continuous Offense Rather Than As A Series Of Discrete Offenses.

In *Faragher v. City of Boca Raton* , 524 U.S. 775(1998) and *Burlington Industries, Inc.*, 524 U.S. 742 (1998) this Court's discussion of salient issues affecting employer liability for actionable hostile environment claims under theories of negligence and vicarious liability instructed lower courts to be guided by a relatively simple and straightforward rule in determining viability of such claims: even when an employer produces evidence of reasonable care (which is not present in this case) it nevertheless remains vicariously liable for harm caused by offending supervisors that the victimized employee could not have avoided through her reasonable care. Recent scholarly discourse has critically commented on the subsequent emasculation of this simple rule drawn from *Faragher* by lower courts "seemingly bent on dismissing substantial harassment cases on employer motions for summary judgment." *See*, John H. Marks, "Smoke, Mirrors, And The Disappearance Of Vicarious Liability: The Emergence Of A Dubious Summary-Judgment Safe Harbor For Employers Whose Supervisory Personnel Commit Hostile Environment Workplace Harassment", 38 Houston L. Rev. 1401 (Spring, 2002) (noting with concern that a recent study confirmed that courts have dismissed over fifty percent of hostile environment cases on summary judgment without any discussion of avoidable consequences or other salient reasons why victims' cases should go to a jury trial.) The Fifth

Circuit panel's decision to "parse" Wyatt's hostile environment claims against respondents for sexual harassment and resultant injuries caused by the intentional infliction of emotional distress perpetrated or caused by her supervisors with immediate and successively higher authority over her under Title VII, La. Rev. Stat. 23:1006 and state tort law, without discussion of salient undisputed evidence patent in the record supporting taking the case to a jury trial, conflicts with decisions by this court, other circuits and the Louisiana Supreme Court.

In *National Railroad Passenger Corporation v. Abner Morgan, Jr.*, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), rendered shortly before the Fifth Circuit's decision in this case, this court reaffirmed its well settled principle first advanced in *Haris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 126 L.Ed. 2d 295, 114 S. Ct. 367, that hostile work environment claims, by their very nature, involve repeated conduct, cannot be said to occur on any day, and require an examination of all circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The Fifth Circuit's decision in this case is in stark conflict with the *Morgan* decision and adversely affects all victimized employees working within its jurisdiction.

The Louisiana Supreme Court cases in harmony with Morgan respecting the appropriate mode of analyzing hostile environment claims, and conflicting with the Fifth Circuit's decision in this case, are *Bustamento v. Tucker*, 607 So. 2d 532 (La. 1992), and *King v. Phelps Dunbar*, L.L.P., 98-1805 (La. 06/05/99), 743 So. 2d 181 (La. 1999).

The Second Circuit's decision is *Fitzgerald v. Henderson*, 251 F.3d 345 (2d Cir. 2001). The Seventh's Circuit decision is *Shanoff v. State of Illinois Department of Human Services*, 258 F.3d 696 (7th Cir. 2001). The First Circuit's decision is *O'Rourke v. City of Providence*, 235 F.3d 713 (1st Cir. 2001).

Alisha Wyatt and other employees unlawfully victimized by discriminating employers and their superviosry agents working within the jurisdiction of the Fifth Circuit have no logical means of reconciling the conflicting decision of the Fifth Circuit in this case with controlling decisions by this court, the Louisiana Supreme Court, and other circuits short of corrective review by this court. The appropriate analysis of an otherwise actionable hostile environment claim where the company received adequate and reasonable notice is very important in providing a respectable measure of predictability in these type cases for litigants on all sides of the issues, and will foster more extrajudicial resolution of such complaints, thereby easing the burdens on the several courts of the land. Finally, persons working or seeking employment within the Fifth Circuit with legitimate discrimination and tort claims have greatly reduced chances than in other circuits in the country of obtaining Seventh Amendment protection of their rights to a jury trial provided by the Civil Rights Act of 1991 and Louisiana law, when confronted by employers' motions for summary judgment.

## 2. The Decision of the Fifth Circuit to Dismiss Substantially All of Wyatt's Title VII and State Law Discrimination and Tort Claims on Summary Judgment Violates the purpose of FRCP 56, Is Clearly Wrong And Impermissibly Denies Victimized Claimants The Right To A Jury Trial Provided Under The Civil Rights Act of 1991 (And Presumably Protected By The Seventh Amendment )

Rule 56(d) of the Federal Rules of Civil Procedure contemplates entry of partial summary judgment for the moving party, Petitioner in this case, where the record evidence, affidavits, depositions and admissions on file clearly demonstrates that the opposing respondents, in this instance Hunt, cannot meet its burden of persuasion at trial on the issue of its affirmative defense for the actionable hostile environment caused by its supervisors, Thompson and Gorum. The Fifth Circuit panel's cavalier approval of summary judgment as a proper mode to aid the employer and short circuit Petitioner's case by dismissal of all of her Title VII and state law discrimination and tort claims, predicated on improper acts or failure to act by company agents with sufficient authority to make decisions in the employment context (up to and including the plant manager) conflicts with decisions by this court, other circuits, the Louisiana Supreme Court and the clear expressions of Congress in the Civil Rights Acts of 1964 and 1991; and poses a number of dangerous precedents which this court must discourage, lest the predictability of positive anti-discrimination law be relegated to the individual whim of different panels and the rights of truly victimized plaintiffs to be made whole be left to the discretion of employers in creating, interpreting and enforcing their own paper tiger policies.

With regard to the issue of intentional infliction of emotional distress, the discrete facts admitted by the respondents (keeping in mind that the Fifth Circuit panel held that there was no genuine dispute concerning the "discrete facts" of this case) are that the immediate supervisor's sexual harassment had been reported by Wyatt to the supervisor with successively higher authority over her and the harasser, namely Gorum; that the harassment was never abated before injury or harm was caused Petitioner; that Gorum properly apprised the plant superintendent, Rachal, of Thompson's problematic behavior, albeit concealing his own involvement; and that the plant superintendent had a duty under Title VII, as an agent of Hunt, to investigate, discover and remediate the harassing behavior of both Thompson and Gorum. There is no genuine dispute that Thompson's conduct of pulling Wyatt's pants down was intentional and calculated to cause her severe humiliation, embarrassment or ridicule; or that Thompson's outrageous behavior was facilitated and aided by Gorum's deliberate failure to stop Thompson, thus constituting a company act. As a result, the Fifth Circuit's decision to dismiss Wyatt's intentional infliction of emotional distress claim was improper and conflicts with jurisprudence by the Louisiana Supreme Court. The seminal Louisiana Supreme Court cases in conflict with the Fifth Circuit panel's decision in this case, specifically approving the tort of intentional infliction of emotional distress as appropriate in sexual harassment cases, are *Nichols v. Allstate Insurance Company*, (No. 99-C-2522, 8/31/00) 765 So. 2d 1017 and *Bustamento v. Tucker*, 607 So. 2d 532 (La. 1992).

**3. The Questions Presented Are Important In Developing A Predictable Standard Of Issue Resolution In This Important And Evolving Area Of Federal And State Anti-discrimination Law Against The Backdrops Of The Seventh Amendment And The Civil Rights Act Of 1991.**

The Seventh Amendment to the United States Constitution provides in relevant part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

The decision by the Fifth Circuit panel impermissibly abrogates this fundamental right by focusing its analysis on reasons to exonerate an otherwise admittedly liable employer rather than engage a searching examination of the record, as pointed out in the summary judgment pleadings by the parties, to determine if there is a reason to sustain a jury trial on Petitioner's discrimination and tort claims.

Recognizing a need for more persuasive measures calculated to assist in encouraging employers to eradicate discrimination from the work environment, the Civil Rights Act of 1991 was enacted by Congress, partly, in order:

> "(1) to provide appropriate remedies for intentional discrimination and *unlawful harassment* in the workplace;... and
>
> (3) to respond to recent decisions of the Supreme Court by *expanding the scope* of relevant civil rights statutes *in order to provide*

> *adequate protection to victims of discrimination.*" Act Nov. 21, 1991, P.L. 102-166, sec.3, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).
>
> The act further provides:
>
> "The Congress finds that - (1) *additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace...*" Act Nov. 21, 1991, P.L. 102-166, sec.2, 105 Stat. 1071, Civil Rights Act of 1991 (emphasis added).

In *Bustamento v. Tucker*, 607 So.2d 532 (La. 1992), the Louisiana Supreme Court noted approvingly that: "it has been pointed out that 'where sexual harassment is asserted, the relationship between tort claims of intentional infliction of emotional distress and Title VII is a strong and obvious one'". *Bustamento*, 607 So.2d at 541, n.14 (citations omitted). That relationship is pristinely evident in this case, and, in the least, the issue should be presented to a jury. The Bustamento court further noted that "(a)n employer's continued inaction also has been held to give rise to a claim for intentional infliction of emotional distress." *Id.*, 607 So.2d 542, n.15 (citing *Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580, 585 (1987)) (employer's repeated failure to take appropriate remedial measures, despite its awareness of employee's complaints, sufficiently outrageous to constitute intentional infliction of emotional distress)). Consequently, Petitioner's right to a jury trial in this case on the torts of assault, battery and intentional infliction of emotional distress has been abrogated in violation of the Seventh Amendment and contrary to the aims and objectives of Title VII and R. S. 23:1006. It is

important, therefore, that this court review the correctness of the Fifth Circuit's decision to dismiss Wyatt's claims of assault, battery and intentional infliction of emotional distress where the highest state court has affirmatively approved of such claims in the context of hostile environment sexual harassment, and to prevent future injustice to victimized Louisiana citizens from an unjust result improperly obtained in a federal court. It has been well established in this court that "where a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it in his powers to do the wrong, rather than by a stranger." *County of Macon v. Shores*, 97 U.S. 272, 279 (1877).

## CONCLUSION

Congress' enactment of the jury trial provisions in the Civil Rights Act of 1991 was in direct response to the perceived failure of the former equitable remedies under Title VII of the Civil Rights Act of 1964 to effectively facilitate the prophylactic aims of eradicating prohibited discrimination in the employment context. As such, Congress raised Title VII protections to include jury trials, protected by the Seventh Amendment, on issues of compensatory and punitive damages. Petitioner's claims are not genuinely disputed, and the employer is unable to articulate a legitimate employment concern which justifies its employment decision to tolerate, even encourage, an environment saturated with discriminatory animus against women because of their sex. As such, Petitioner desires and should be entitled to equitable relief in the form of a declaration that Hunt has engaged in discriminatory employment *practices*, as set forth in her original, amended and supplemental complaints, and as prayed for in her summary judgment pleadings in the district court and in her brief to the Fifth Circuit Court of Appeals.

This case presents squarely the issue of whether or not a hostile environment claim predicated upon the harassing acts of Petitioner's supervisors with immediate *and* successively higher authority, entitles the Petitioner to partial summary judgment on the issue of the Respondent employer's liability where the Petitioner's conduct is reasonable, as a matter of law, and the employer's failure to stop the harassment is totally unreasonable, in light of its adequate advance knowledge and abundant opportunity to prevent the eventual harm.

Finally, it is imperative that victimized employees in the Fifth Circuit, and the greater United States, should be able to rely on a certain degree of predictability in the analysis, evaluation and dispensation of discrimination issues under Title VII and Louisiana's anti-discrimination law, given the split among the circuits as to whether or not a constructive discharge constitutes a "tangible employment action."

Respectfully Submitted,

Donald G. Kelly, Counsel of Record
Vincent C. Cofield, (Applicant for Admission)
Counsel for Petitioner,
ALISHA WYATT

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

**No. 01-30361**

**[Filed August 14, 2002]**

| | |
|---|---|
| ALISHA WYATT, | ) |
| Plaintiff - Appellant | ) |
| | ) |
| v. | ) |
| | ) |
| HUNT PLYWOOD CO, INC; | ) |
| ET AL, | ) |
| Defendants; | ) |
| | ) |
| HUNT PLYWOOD CO, INC; | ) |
| FEDERAL INSURANCE CO, | ) |
| Defendants - Appellees | ) |
| | ) |

Appeal from the United States District Court
for the Western District of Louisiana, Alexandria

**JUDGES:**
Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

## OPINION

ON PETITION FOR REHEARING AND
REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing En Banc is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

Jacques L. Wiener, Jr.
United States Circuit Judge

Judge Carolyn Dineen King did not participate in the consideration of the rehearing en banc.

## APPENDIX B

## UNITED STATES COURT OF APPEALS
## FOR THE FIFTH CIRCUIT

**No. 01-30361**

**[Filed July 5, 2002]**

| | |
|---|---|
| ALISHA WYATT, | ) |
| Plaintiff-Appellant, | ) |
| | ) |
| versus | ) |
| | ) |
| HUNT PLYWOOD COMPANY, | ) |
| INC.; ET AL, | ) |
| Defendants, | ) |
| | ) |
| HUNT PLYWOOD COMPANY, | ) |
| INC. and FEDERAL INSURANCE | ) |
| COMPANY, | ) |
| Defendants-Appellees. | ) |
| | ) |

Appeal from the United States District Court
for the Western District of Louisiana
00-CV-234
F A Little, Jr, US District Judge

**JUDGES:**
Before HIGGINBOTHAM, WIENER, and BENAVIDES, Circuit Judges.

## OPINION

WIENER, Circuit Judge:

Plaintiff-Appellant Alisha Wyatt appeals the district court's grant of summary judgment in favor of Defendants-Appellees Hunt Plywood Co. and Federal Ins. Co. (collectively "Hunt") on her Title VII sex discrimination claim, her state law tort claims, and her motion for a jury trial. Concluding that (1) as to one aspect of Wyatt's sexual harassment claim based on the behavior of a Hunt supervisor, factual questions exist regarding Hunt's affirmative defense under the Ellerth/Faragher test,[1] and (2) Wyatt did not waive her right to a federal jury trial, we reverse, in part, the grant of summary judgment in favor of Hunt and remand with instructions.

Plaintiff-Appellant Wyatt was an employee of Hunt from March 1994 until she quit her job in May 1995. Her immediate supervisor was John Thompson and her next higher supervisor was Donald Gorum, both of whom allegedly harassed Wyatt sexually.[2] When Wyatt was hired, she received a copy of Hunt's employee relations manual

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[1] *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1999); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1999).

[2] Thompson was a "lead man" whose duties apparently included the smooth operation of a certain portion of the work floor. The district court, in its Ruling and Judgment, referred to Thompson as Wyatt's "co-employee," but as discussed in greater detail below, Hunt has already admitted the fact of Thompson's status as Wyatt's immediate supervisor.

which contained Hunt's sexual harassment policy. In relevant part, that policy directs: "Employees who feel that they have been harassed are urged to contact their supervisor, a member of the Personnel Department, Mr. Gary Crawford, or me [Alex T. Hunt, Executive Vice President]."[3] Wyatt admits that she had knowledge of the policy and was aware that she could report harassment to any one or more of the individuals listed.

Wyatt alleges that, almost immediately after she began working at Hunt, Thompson commenced harassing her sexually, referring to her in vulgar terms and continually asking her to have sex with him. Wyatt asserts that she promptly complained of Thompson's conduct to Gorum, her and Thompson's next higher supervisor; but that despite her complaints and Gorum's informal discussions with Thompson, the harassment persisted. The discrete facts of Thompson's harassment and Wyatt's reporting them to Gorum are not in dispute.

Wyatt further alleges, and Hunt concedes, that instead of remedying the problem, Gorum himself eventually subjected Wyatt to sexual advances and harassment, beginning in late June or early July 1994. Wyatt concedes, however, that she never reported Gorum's conduct to anyone higher up the management chain during her time at Hunt.

Thompson's harassment of Wyatt reached its zenith on November 12, 1994, when he sneaked up behind her and

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[3] Documents Filed with Hunt's Motion for Summary Judgment, Defendant's Ex. 3.

pulled down her sweat pants while she was actively working on the line, and in the plain view of other employees. Wyatt immediately complained to Gorum, who promptly discussed the incident with Wyatt and agreed to write an incident report. Nevertheless, in an effort to down-play Thompson's actions, Gorum declined to indicate in the report that Thompson had pulled Wyatt's pants down.

Wyatt did not report to work on the day following the pants incident, but did on the day after that, when she met with Buddy Rachal, the superintendent to whom Gorum reported. After hearing Wyatt's version of the story, Rachal promptly reported the matter to Larry Manthei, Hunt's Plant Manager. Manthei commenced an investigation, suspended Thompson and Gorum, and informed Wyatt that any further harassing actions were to be reported to Rachal. Just three days after the pants incident, Hunt completed its investigation, fired Thompson for inappropriate conduct, and fired Gorum for misrepresenting facts to management and mishandling the situation as a supervisor.

Wyatt alleges that, following these firings, she was ostracized and criticized by her co-workers. She advised supervisors of this development and, over the next few months, Hunt management personnel met with Wyatt's co-workers, individually and in groups, informing them that Wyatt was not to be criticized or otherwise treated unfairly for reporting Gorum and Thompson.

Wyatt's employment with Hunt continued until she quit in May 1995. She then filed suit against Hunt in state court, asserting state law tort claims for assault, battery, and intentional infliction of emotional distress.

In her state court petition, Wyatt requested a jury trial, but failed to post the required bond before the specified deadline. This led Hunt to file a motion to strike Wyatt's jury demand. Wyatt did not directly respond; instead, she filed a motion to amend her original petition to add a Title VII claim and to name Federal Insurance Company (Hunt's liability insurance carrier) as an additional defendant. In considering both parties' motions, the state court expressly informed Wyatt that she had forfeited her right to a jury trial by not posting the required bond, expressly admonishing her that she could not use her amended petition, which did not allege any new facts, to breathe life into her erstwhile jury trial demand.

After Wyatt added the federal claim, Hunt removed the case to federal district court. Some nine weeks after removal, Wyatt filed a motion for a jury trial. Without addressing the timeliness of her federal jury demand, the court denied the motion on grounds that she had waived her right to a jury trial by her acts in the state court proceedings. Wyatt then filed (1) a mandamus petition requesting that we order the district court to grant her a jury trial, (2) a notice of appeal from the district court's denial of jury trial, and (3) a second motion for jury trial in district court. We first denied her mandamus petition and then dismissed her appeal for want of prosecution. The district court denied her second motion for a jury trial.

Hunt filed a motion for summary judgment in district court seeking dismissal of Wyatt's claims. Wyatt opposed Hunt's motion and filed her own motion for partial summary judgment as to liability. The district court granted Hunt's summary judgment and dismissed Wyatt's action with prejudice, after which Wyatt timely filed a notice of appeal.

## II. ANALYSIS

### A. Standard of Review

We review the district court's rulings on summary judgment motions de novo, employing the same analysis as the district court.[4] A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact.[5] An issue is material if its resolution could affect the outcome of the action.[6] In deciding whether a fact issue has been created, we must view the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party.[7]

The standard for summary judgment mirrors that for judgment as a matter of law.[8] Thus, we must review all of the evidence in the record but make no credibility determinations or weigh any evidence.[9] In reviewing the evidence, we must

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[4] Fed. R. Civ. P. 56.

[5] Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

[7] *See Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999).

[8] *Celotex Corp.*, 477 U.S. at 323.

[9] Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150, 147 L. Ed. 2d 105, 120 S. Ct. 2097 (2000).

disregard everything favorable to the moving party that the jury is not required to believe, and should give credence to the evidence favoring the nonmoving party as well as that evidence supporting the moving party that is uncontradicted and unimpeached.[10]

### B. Supervisor Sexual Harassment After Ellerth and Faragher

For the sake of clarity, we reiterate our established methodology for analyzing supervisor sexual harassment cases under Title VII.[11] First we determine whether the complaining employee suffered a "tangible employment action."[12] If he has, the claim is classified as a "quid pro quo" case; if he has not, the claim is classified as a "hostile environment" case.[13] In a quid pro quo suit, proof that a tangible employment action resulted from a supervisor's sexual harassment renders the employer vicariously liable, and no affirmative defense can be asserted. In a hostile environment case, however, the next inquiry is whether the supervisor's actions constituted severe or pervasive sexual harassment: If the conduct was not severe or pervasive, the employer cannot be held liable vicariously for the supervisor's actions; if the conduct was

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[10] *Id.* at 151.

[11] *See Casiano v. AT & T Corp.*, 213 F.3d 278 and attached appendix (5th Cir. 2000) (attached appendix providing a "roadmap" for analysis of supervisor sexual harassment claims).

[12] *Id.*

[13] *Id.* at 283.

severe and pervasive, the employer is vicariously liable unless the employer can establish both prongs of the conjunctive Ellerth/Faragher affirmative defense the only affirmative defense to vicarious liability now available in a supervisor sexual harassment hostile work environment case.[14] To establish this defense, the employer must show that (1) the employer exercised reasonable care to prevent and correct promptly any sexual harassment, and (2) the complaining employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

### C. Application of the Ellerth/Faragher Test

Wyatt seeks to recover from Hunt, not for any direct sex discrimination by Hunt, but for its vicarious liability for the sexual harassment visited on her by supervisors. The supervisor sexual harassment allegedly experienced by Wyatt in this case is properly classified as a hostile work environment claim.[15] To state a prima facie hostile work

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[14] *Id.* at 284.

[15] As stated, the Ellerth/Faragher affirmative defense, discussed below, cannot be advanced when the employer has taken a tangible employment action. These cases classify such an action as "quid pro quo" harassment. Although Wyatt argues that she was "constructively discharged" from Hunt, the district court noted and we agree that Wyatt's allegations in this regard are nothing more than "vague protestations." Despite her recitation of case law, she does not advance a coherent claim of constructive discharge or other tangible employment actions by Hunt. Therefore, under Ellerth/Faragher, her claim is based solely on supervisor sexual

environment claim, Wyatt must prove that the she was subjected to severe and pervasive harassment by a supervisor based on her sex.[16] The district court assumed, and Hunt conceded for purposes of its summary judgment motion, that Thompson's and Gorum's conduct was sufficiently severe and pervasive to constitute an actionable hostile workplace environment. Having so conceded, Hunt could nevertheless avoid vicarious liability by establishing, pursuant to Ellerth/Faragher, that (1) it exercised reasonable care to prevent and promptly remedy the harassment and (2) Wyatt unreasonably failed to use the preventative and remedial opportunities provided by the Hunt.[17]

Here, the district court concluded that Hunt had satisfied both prongs of the Ellerth/Faragher defense and thus was not vicariously liable to Wyatt for the actions of Gorum or Thompson. In concluding that Hunt satisfied the first prong, the court recited the undisputed facts that Hunt maintained a sexual harassment policy which it promulgated to all employees, including Wyatt, and that she knew that the policy instructed employees to report harassing incidents and to whom the report should be made. In addition, Hunt held regular meetings with its supervisory staff to train them on preventing sexual harassment. Also, as soon as Rachal and Manthei learned of the November 12th incident and

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harassment without a related tangible employment action, thereby constituting a "hostile work environment" claim against Hunt for vicarious liability only.

[16] *Casiano*, 213 F.3d at 284.

[17] *Id.*

Thompson's previous behavior, an investigation was immediately initiated and within three days (one or two days after Rachal and Manthei were so informed) both Gorum and Thompson were fired.

The court concluded that Hunt satisfied the second prong of the Ellerth/Faragher affirmative defense as well. Wyatt concedes that, prior to the November 12th incident, she complained only to Gorum about Thompson's untoward behavior between its onset and the time Gorum started to harass her approximately March through June, 1994 and that she never reported Gorum's allegedly harassing conduct to anyone. The court noted that Hunt's policy did not restrict Wyatt to reporting Thompson's behavior only to Gorum and that Wyatt could have reported Thompson's harassment to other supervisors listed in the sexual harassment policy, especially once it became clear to Wyatt that Gorum was ineffectual in changing Thompson's behavior toward her. Hunt asserted, and the district court agreed, that Gorum's informal rules and unwritten customary practices, which purportedly forbade employees to bypass his authority, were not reasonable excuses for Wyatt's failure to inform higher management personnel. The district court was convinced that under these conceded or undisputed facts Wyatt's failure to report Thompson's behavior to anyone but Gorum and her failure to report Gorum's behavior to anyone at all no reasonable jury could help but find that Wyatt unreasonably failed to use Hunt's preventative and remedial opportunities for reporting and obtaining redress for her supervisor's sexual harassment.

1. Supervisor or Co-Employee?

a. Thompson

As the Ellerth/Faragher affirmative defense to vicarious liability is available to employers only when the harassing employee who creates the actionable environment is a supervisor, this analysis begins with an assessment of Thompson's job position vis-a-vis Wyatt. An employer's responsibility for sexual harassment by a fellow employee of equal rank is adjudged by a legal standard different from that established by the Court in Ellerth and Faragher, which applies to supervisors only.

Wyatt consistently maintained that Thompson was her immediate supervisor, not her fellow employee of equal rank in the chain of command. Hunt acknowledges that it conceded this fact arguendo for purposes of its summary judgment motion in district court. Apparently as a stray remark, without comment or analysis, the district court referred to Thompson as Wyatt's co-employee, but proceeded correctly, we think to apply the supervisor test of Ellerth/Faragher anyway. On appeal, Hunt now equivocates, claiming that despite granting arguendo that Thompson was a supervisor, the district court concluded that Thompson was a co-employee, providing an alternative basis for affirmance.

Our review of the concessions and undisputed facts and allegations in the record convinces us that Thompson was Wyatt's supervisor a fact that, for all purposes of this case, Hunt has judicially admitted as much and cannot now avoid it by classifying that admission as mere supposition for purposes of summary judgment. As an preliminary matter, we

emphasize that the facts proffered by the parties regarding the supervisor/co-employee determination were not contradicted in the district court: Wyatt pointed to Thompson's authority to direct her daily activities and the representations made to her when she began employment; Hunt emphasized Thompson's low wage-earning compensation and his inability directly to hire or fire those in Wyatt's position. We need not resolve this difference in viewpoint, however, to reach our conclusion that Thompson was Wyatt's supervisor. Instead, we base our decision on (1) Thompson's deposition testimony and (2) Hunt's verified answer to Wyatt's complaint.

When, in his deposition, Thompson was asked by Wyatt's attorney about his employment position, Thompson described himself as a supervisor. Specifically, he testified that he supervised Wyatt's daily activities, and that, in turn, he was under the immediate supervision of Gorum.

More legally determinative than Thompson's self-description as Wyatt's supervisor, however, is Hunt's unqualified admission of that fact in its answer to Wyatt's complaint. In paragraph 4, Wyatt's state court petition alleged that her "immediate supervisor was John Thompson. Mr. Thompson was supervised by Donald Gorum who also supervised petitioner [Wyatt]." Hunt's verified answer to Wyatt's petition states that "with respect to the allegations of Paragraph 4 of the Petition, Hunt admits that from the time she was employed until approximately November 14, 1994, [Wyatt's] immediate supervisor was John Thompson and Mr. Thompson's supervisor was Donald Gorum." With this unequivocal judicial admission in the record, Hunt's contention that it merely conceded Thompson's supervisory

status arguendo rings hollow.[18] We therefore proceed from the premise that Thompson was Wyatt's immediate supervisor, thereby justifying the application of the Ellerth/Faragher test for vicarious liability, holding that Hunt is estopped from claiming otherwise.[19]

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[18] *Martinez v. Bally's Louisiana, Inc.*, 244 F.3d 474, 476 (5th Cir. 2001):

> A judicial admission is a formal concession in the pleadings or stipulations by a party or counsel that is binding on the party making them. Although a judicial admission is not itself evidence, it has the effect of withdrawing a fact from contention.... "A judicial admission is conclusive, unless the court allows it to be withdrawn...." (internal citations omitted).

*See also American Automobile Assoc. v. AAA Legal Clinic of Jefferson Crooke*, 930 F.2d 1117, 1120 (5th cir. 1991):

> In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial.... An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. (internal quotations and citations omitted).

[19] In light of Hunt's admission, we disregard the district court's conclusional statement that Thompson was Wyatt's co-employee.

b. Gorum

None question that Gorum was a supervisor. Neither is it contested that he supervised both Wyatt and Thompson.

2. Distinct Periods of Harassment

Having concluded that both Thompson and Gorum were Wyatt's supervisors for purposes of determining Hunt's vicarious liability, and before turning to the merits of Wyatt's harassment claims and Hunt's affirmative defense, we parse Wyatt's career path at Hunt, which comprised three discrete periods. Wyatt began her employment in March of 1994. Her uncontradicted allegation that Thompson began harassing her almost immediately establishes the commencement of the initial period of supervisor harassment. Despite Gorum's alleged talks with Thompson, the harassment by Thompson appears to have continued unabated until late June or early July, when Gorum himself became a harasser, continually propositioning Wyatt for sex and making lewd comments. Wyatt's admission that she did not thereafter report either Thompson's behavior or this behavior by Gorum to his supervisors or others listed in the sexual harassment policy manual establishes late June or early July as the end of the first discrete period of harassment. It also establishes July 1, 1994 as the approximate start date of the second discrete period of supervisor harassment. Then, as recounted in detail above, Wyatt's pants were pulled down on November 12th, after which Gorum's supervisors became aware of the situation and terminated both Thompson and Gorum within three days thereafter. Thus November 15 marks the end of the second period of supervisor harassment and the initiation of the third discrete period of Wyatt's employment, during

which no supervisor sexual harassment is alleged.

Thus, the facts of this case neatly divide Wyatt's employment with Hunt into three distinct periods for purposes of our analysis of her sexual harassment claims: (1) March 1994 to late June/early July 1994, during which Thompson's alleged sexual harassment of Wyatt took place and was reported by her to Gorum; (2) late June/early July to November 15th, during which period both Thompson and Gorum allegedly harassed her sexually, and she made no further reports to Hunt management personnel until the pants incident, which she reported, resulting in prompt and effective response by Hunt; and (3) November 16 1994 until she quit in May 1995, at no time during which does she claim to have been sexually harassed by Thompson or Gorum, who had been fired, or by other Hunt supervisors (although Wyatt's co-workers shunned her doing that final period for having ratted on Thompson and Gorum).

3. Hunt's Affirmative Defense Under Ellerth and Faragher

Keeping the three distinct periods of Wyatt's continuous employment at Hunt in mind, we now address Hunt's affirmative defense to vicarious liability for its supervisors' actions. First, we fully agree with the district court's grant of summary judgment in favor of Hunt for the second and third periods of Wyatt's employment, as to both Thompson and Gorum. After it became clear to Wyatt that Gorum was not only ineffective in dealing with Thompson's harassment, but that he (Gorum) himself was a sexual harasser, Wyatt's failure to report either Thompson's or Gorum's behavior to one or more among the other individuals

listed in the sexual harassment policy was unreasonable.

Hunt's policy made clear that several persons in addition to the employee's immediate and next higher supervisors were available to receive and pursue sexual harassment claims. When Gorum's harassment began, Wyatt's reasonable (not to mention obvious) course of action would have been to report Thompson's and Gorum's conduct to one of those individuals with authority higher than Gorum's. Wyatt's reliance on Gorum's unofficial and informal admonitions not to "go over his head" do not excuse her failure to disclose harassment to a higher authority at Hunt. Her failure to act was not reasonable, especially when Gorum was one of the persons who was creating the actionable hostile environment. When Hunt's higher management personnel became aware of Thompson's sexually harassing conduct and Gorum's misrepresentation of it, Thompson and Gorum were suspended, investigated, and fired promptly. As Hunt's sexual harassment policy and its implementation of the policy are more than adequate, Hunt is entitled to summary judgment dismissing Wyatt's claims for any sexual harassment by Thompson or Gorum that may have occurred between early July and mid-November 1994.

Similarly, under the Ellerth/Faragher test, Hunt cannot be held vicariously liable for any supervisor sexual harassment after November 15th, as none of Wyatt's allegations relative to that third period of her employment implicates sexual harassment, much less harassment by supervisors. Wyatt's complaints about shunning or ostracism by fellow workers during that third period do not implicate sexual harassment. In addition, as soon as higher management became aware of the pants incident, Hunt immediately

responded to its supervisors' sexual harassment by suspending Thompson and Gorum, commencing an investigation, firing them, and counseling employees against mistreating Wyatt. Thus, when the facts are viewed in the light most favorable to Wyatt, Hunt cannot be held vicariously liable to her for occurrences during the third period because she cannot establish either that (1) actual sexual harassment by supervisors continued during the third period, or (2) Hunt unreasonably and dilatorily responded once higher management personnel became aware of the supervisor sexual harassment, because none occurred.

More problematic, however, is the initial four-month period of Wyatt's employment, from March until early July, 1994. During this time, Wyatt's immediate supervisor, Thompson, harassed her; and she responded by promptly and appropriately reporting Thompson's behavior to Gorum, his immediate supervisor and her successively higher supervisor. In doing so she complied reasonably with Hunt's policy and procedures. Yet, if any remedial action were taken by Gorum, it was wholly ineffectual: Thompson's harassment of Wyatt continued unabated.

Under the Ellerth/Faragher rubric, the one affirmative defense open to Hunt for Wyatt's first period of employment fails because her actions were reasonable: After promptly reporting Thompson's conduct to Gorum, who assured Wyatt that he would handle the situation, nothing in Hunt's harassment policy and procedures required Wyatt to take additional steps, at least not during the relatively short duration of that first period. Therefore, for the period that began with Wyatt's first report to Gorum of Thompson's harassment and ended when Gorum himself began harassing

Wyatt, Hunt cannot establish the second prong of the conjunctive Ellerth/Faragher affirmative defense: Hunt cannot show that Wyatt unreasonably failed to use the preventative and remedial opportunities provided by the employer.[20]

Our plenary review convinces us that Hunt is not entitled to summary judgment of dismissal as to this one aspect of Wyatt's complaint, i.e., her claim that Hunt is vicariously liable for sexual harassment by her supervisor, Thompson, during the period of March through July, 1994. We must therefore reverse the district court's grant of Hunt's summary judgment to the extent it dismissed this portion of Wyatt's action, even though we affirm as to all other aspects of the district court's ruling.

In partially reversing and remanding for further proceedings, however, we note that Wyatt's burden on remand remains substantial. She must establish a prima facie claim of hostile work environment supervisor sexual harassment for this initial period of her employment.[21] As we noted in our detailed recounting of the Ellerth/Faragher analysis, Wyatt will have to show that Thompson's conduct was sufficiently severe and pervasive to be actionable sexual harassment.[22] Hunt is estopped to deny Thompson's supervisor status because of its unequivocal and unconditional admission in its pleadings, but Hunt has conceded that Thompson's actions were sufficiently severe and pervasive

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[20] *See Faragher*, 524 U.S. at 807.

[21] *See Casiano*, 213 F.3d 278.

[22] *Id.*

only for purposes of its summary judgment motion and this appeal. That concession, in conjunction with our conclusion regarding the viability of Hunt's affirmative defense to Wyatt's first period of employment, gain Wyatt only the opportunity, on remand to the district court, to prove the severity and pervasiveness of Thompson's conduct during Wyatt's employment at Hunt between March to July of 1994. If, but only if, she can bear that burden will she be entitled to recover from Hunt such damages as she may then be able to prove.

### C. Dismissal of State Law Tort Claims

Wyatt also asserts various state law tort claims against Hunt premised on the Louisiana state law version of vicarious (respondeat superior) liability. The Louisiana Supreme Court has clarified that an employer is vicariously liable for an employee's tort if the "employee was acting within the course and scope of his employment."[23] In considering whether an employer can be held liable for a supervisor's actions in committing a tort against a fellow employee, the Louisiana Supreme Court considers the following four factors:

> (1) whether the tortious act as primarily employment rooted;
>
> (2) whether the [tortious act] was reasonably incidental to the performance of the employee's duties;

---

[23] *Baumeister v. Plunkett*, 673 So. 2d 994, 996-97 (La. 1996).

> (3) whether the act occurred on the employer's premises; and
>
> (4) whether it occurred during the hours of employment.[24]

Not all four factors must be found to favor the employee for liability to attach, but an employer cannot be held liable if only the last two factors are met.[25]

Here, the district court concluded that Hunt could not be held vicariously liable for Thompson's and Gorum's actions. It is apparent that Thompson's actions were not related to his duties but instead were rooted in personal motives unrelated to employment. The most that can be said is that his behavior occurred on Hunt's premises during work hours, but alone this is not enough to produce state law vicarious liability. Similarly, given Wyatt's allegations that Gorum (1) acted inappropriately towards her, (2) mishandled her complaints about Thompson, and (3) misrepresented the facts to higher management or hid them from management, Gorum's conduct cannot be understood as advancing Hunt's legitimate business interests. Thus, the district court's conclusion that Thompson and Gorum were acting out of personal motives unrelated to their employment, thereby exonerating Hunt from state law vicarious liability for their supervisory employees' actions, was correct and is affirmed.

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[24] *Id.* (quoting *LeBrane v. Lewis*, 292 So. 2d 216, 218 (La. 1974)).

[25] *Id.*

**D. Denial of Jury Trial**

The last question before us is whether Wyatt is entitled to a jury trial in federal court despite having forfeited her demand for a jury trial in state court by failing to meet the bond requirement attendant on such demands in state court. The district court ruled that Wyatt's waiver of her right to a jury trial in state court, caused by her failure to post a bond as required by state (but not federal) law, vitiated her entitlement to a jury trial in federal court following removal. We, however, can find no authority for the proposition that a litigant in a removed action loses her right to a federal jury trial by any act or omission in connection with a state requirement that is not applicable in federal court.

To the contrary, Federal Rule of Civil Procedure 81(c) speaks in broad terms, stating that "if at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served ... within 10 days after service on the party of the notice of filing the petition." In addition, federal appellate case law supports the view that a party need not file a new jury demand in federal court if one that would have satisfied the federal requirements was filed in state court.[26]

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[26] *See Mondor v. United States District Court for the Central District of California*, 910 F.2d 585, 586-87 (9th Cir. 1990):

> The majority of federal courts addressing the issue held that a new jury demand need not be filed after removal where one had been filed in state court

Here, the demand for a jury trial contained in Wyatt's complaint would have satisfied Federal Rule 38(b).[27] Further, although Hunt answered the complaint before removal to federal court, Federal Insurance Company, the added defendant, did not answer until April 17, 2000, two months after removal. Wyatt reasserted her demand for a jury trial in a motion filed in federal court on April 26, 2000, thus bringing her within the ambit of Rule 38(b) regardless of our conclusion that her jury trial demand was automatically carried with her case when it was removed to federal court. We are therefore constrained to reverse the district court's denial of Wyatt's demand for a jury trial.

---

> because the previously filed demand became a part of the federal court record.
>
> ...
>
> We therefore hold that, where a pre-removal jury demand would satisfy federal but not state requirements, that demand is incorporated into the federal record upon removal, and is deemed to satisfy Rule 38(b).

*see also* Wright & Miller, Federal Practice and Procedure, § 2319 and accompany notes (citing Mondor v. U.S.; also citing *Bush v. Allstate Ins. Co,* 425 F.2d 393, 395-96 (5th Cir. 1970) for the proposition that "even if a party has waived his right to jury trial in state court by a failure to demand it as required by state procedure, he has a new opportunity to demand the right on removal to a federal court.").

[27] Fed. R. Civ. P. 38(b) requires that a party make the demand in writing and serve it on the opposing party within 10 days of the last pleading directed to the issue on which jury trial is requested.

## III. SUMMARY

We affirm the district court's dismissal of Wyatt's state law vicarious liability claims, but we reverse the court's denial of her request for a federal jury trial. We affirm the district court's grant of summary judgment on Hunt's vicarious liability for the actionable environment created by its supervisors to the extent that judgment dismissed Wyatt's federal claims grounded in Gorum's conduct, as well as those grounded in Thompson's conduct after late June, 1994. We reverse and remand, however, for further proceedings addressing, inter alia, the severity and pervasiveness of the sexual harassment of Wyatt by Hunt's supervisor, Thompson, for the portion of Wyatt's employment spanning the period of March 1994 through June 1994. If the results of such further proceedings lead to trial, Wyatt must be afforded a jury trial.

AFFIRMED in part; REVERSED and REMANDED in part, with instructions.

## APPENDIX C

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF LOUISIANA**
**ALEXANDRIA DIVISION**

**Civil Action No. 00-234**
**Section "A" (Judge Little)**

**[Filed February 15, 2001]**

| | |
|---|---|
| ALISHA WYATT | ) |
| | ) |
| -vs- | ) |
| | ) |
| HUNT PLYWOOD COMPANY, INC., et al. | ) |
| | ) |

**RULING AND JUDGMENT**

Before this court is a Motion for Summary Judgment, filed on behalf of defendants Hunt Plywood Comply and Federal Insurance Company ("Hunt"), and a Motion for Partial Summary Judgment filed by plaintiff Alisha Wyatt ("Wyatt"). Both parties have filed opposing briefs. For the following reasons, defendants' motion is GRANTED. Plaintiff's motion for partial summary judgment is DENIED.

## FACTUAL BACKGROUND

Wyatt was employed by Hunt in its Pollack, Louisiana plywood plant. She was hired on 7 March 1994 and remained employed by Hunt until she quit her job on 17 May 1995. Wyatt worked as a utility hand and later as a dryer feeder; as a utility hand, her duties involved cleaning different areas of the plant; as a dryer feeder, she fed sheets of veneer into a drying machine.

Wyatt contends that she was subjected to unlawful sexual harassment by a co-worker, John Thompson ("Thompson"), which culminated in Thompson pulling down her pants in the workplace on 12 November 1994, Prior to this incident, Wyatt states that Thompson continually "ask[ed] her to have sex with him... ask[ed] her to meet with him so she could have sex with him, and us[ed] vulgar terms to refer to her." Compl. at 1. She rejected his advances. Wyatt asserts that she unsuccessfully complained of Thompson's conduct prior to this incident to her supervisor, Donald Gorum ("Gorum"). Wyatt further contends that Gorum subjected her to unwanted sexual advances, but has acknowledged that she failed to report his conduct at any time while she was employed by Hunt. Following the 12 November incident, Gorum attempted to cover up Thompson's actions. On 15 November 1994, after investigating the incident, Hunt terminated both Thompson and Gorum; Thompson for inappropriate conduct and Gorum for misrepresenting the facts to management and for mishandling the situation as a supervisor.

Hunt has a written policy prohibiting sexual harassment that encourages its employees to report sexual

harassment. This policy was in place during Wyatt's employment with the company, and she has acknowledged receipt of the company handbook containing the policy. The policy states in part: "Employees who feel that they have been [sexually] harassed are urged to contact their supervisor, a member of the Personnel Department, Mr. Gary Crawford, or me [Alex T. Hunt, Executive Vice President]." Wyatt has stated that she was aware of the policy and understood that if she was harassed, she could report it to any of these individuals. The policy is also posted in the Plant, and the company conducts annual training sessions for supervisors on sexual harassment.

Following the terminations of Thompson and Gorum, Wyatt asserts that several co-workers made negative comments to her regarding the situation. Hunt management held at least one meeting with co-workers of Wyatt and indicated that the co-workers should consider the incident and the terminations as past events and cease the negative commentary directed at Wyatt. Wyatt continued to work at Hunt for seven months following the incident with Thompson. She quit her job with Hunt on 17 May 1995. On 9 November 1995, she initiated the instant lawsuit against Hunt in state court, asserting state law claims of assault, battery, and intentional infliction of emotional distress. On 24 January 2000, Plaintiff amended her petition to add a claim under Title VII for sex discrimination stemming from sexual harassment in the workplace. Defendants timely removed the action to this court.

## ANALYSIS

Both Hunt and Wyatt seek relief pursuant to Federal Rule of Civil Procedure 56. Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any" when viewed in the light most favorable to the non-moving party, indicate that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2509-10 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non moving party. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *See id.* at 255, 106 S, Ct. at 2513. Once the moving party has initially shown "that there is all absence of evidence to support the nonmoving party's case," *Celotex Com. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986), the non-moving party must come forward, after adequate time for discovery with "specific facts" showing a genuine factual issue for trial. *See* Fed. R. Civ. P. 56(e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348 (1986). "If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party," Fed. R. Cir. P. 56(e).

Title vii of the Civil Rights Act of1964, as amended, permits an individual to bring a cause of action against an employer who engages in unlawful discrimination. Under Title VII, it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1)(2000).

Title VII permits employees who have been subjected to unwelcome sexual harassment to sue their employer for discrimination. Title VII jurisprudence has recognized two types of sexual harassment which affect the "compensation, terms, conditions, or privileges of employment." These two forms of sexual harassment are (1) "quid pro quo," harassment, which occurs when an individual explicitly or implicitly conditions a job, a job benefit, or the absence of a job detriment, upon the employee's acceptance of unwanted sexual conduct, and (2) "hostile work environment" sexual harassment, which consists of verbal or physical conduct that has the effect of creating an intimidating, hostile, or offensive work environment. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986). To prevail on a claim for hostile work environment sexual harassment, the plaintiff must establish that the workplace was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." *Faragher v. City of Boca Raton*, 524 U.S. 775, 787, 118 S. Ct. 2275, 2284 (1998). A plaintiff claiming hostile work environment sexual harassment must prove: (1) that she belongs to a protected class; (2) that she was subjected to unwelcome sexual harassment; (3) that the harassment was "because of sex"; (4) that the harassment affected a "term, condition, or privilege" of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. *See Shepherd v. Comptroller of Public Accounts*, 168 F.3d 871,

873 (5th Cir.), *cert. denied*, 528 U.S. 963, 120 S. Ct. 395 (1999).

Further, "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292-93. In the absence of a tangible employment action, an employer defending a Title VII claim may raise an affirmative defense to liability. The employer must demonstrate that (1) the employer exercised reasonable care to prevent and correct promptly sexual harassment, and (2) the plaintiff unreasonably failed to utilize preventative or corrective opportunities provided by the employer. *See id.*

Although the Fifth Circuit has cautioned that "[w]hat constitutes [a] . .. hostile working environment is a fact-sensitive determination," *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 n.8 (5th Cir. 1999), such a determination need not always be left to a jury. It is clear that "'simple teasing,' offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 524 U.S. at 788, 118 S. Ct. at 2284. Claims involving alleged conduct that fails to alter the conditions of the working environment can properly be disposed of on a motion for summary judgment. *See Indest*, 164 F.3d at 264 n.8.

Hunt contends that plaintiff's Title VII claim for sexual harassment based upon the 12 November incident is not actionable because it took prompt remedial action once it learned of the incident. Because we agree with the defendants,

the Title VII claim as it relates to the November incident is dismissed. Thompson's repeated harassment of plaintiff, culminating in his pulling down her pants in the workplace, could be viewed by a jury as so egregious that it altered a term or condition of her employment. Title VII requires, however, that the plaintiff also demonstrate that the employer knew or should have known about the harassment and failed to take prompt remedial action. In the instant case, Hunt terminated both Thompson and Gorum a mere three days after learning of the 12 November incident. Such a swift investigation and disposition of the matter clearly constitutes "prompt remedial action ?"

Hunt also urges disposition of plaintiff's Title VII claim as it relates to the pre-November harassment by both Thompson and Gorum. Hunt concedes, for purposes of its motion, that Gorum's and Thompson's conduct prior to the November incident constituted severe and pervasive harassment otherwise actionable under Title VII. In addition, it is undisputed that plaintiff quit her job some seven months following Hunt's termination of Thompson and Gorum. We conclude that no reasonable jury could find that Hunt took any tangible employment action against Wyatt, despite plaintiff's vague protestations regarding constructive discharge. Under current Title VII jurisprudence, therefore, if Hunt can show that (1) it exercised reasonable care to prevent and correct sexual harassment in the workplace and (2) Wyatt unreasonably failed to take advantage of preventative or corrective measures provided by Hunt, it has established an affirmative defense to liability, *See Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293. Because we find that Hunt has established this affirmative defense, the remainder of plaintiff's claim under Title VII is dismissed.

Hunt had in place a written sexual harassment policy, which it distributed to its employees and prominently displayed in the workplace. It also conducted regular training sessions with its supervising employees in order to prevent sexual harassment. Upon learning of the November incident, and Thompson and Gorum's involvement therein, Hunt promptly investigated the incident and fired both individuals. All of these factors lead us to conclude that Hunt took reasonable care to prevent and correct sexual harassment in the workplace. Hunt has satisfied the first prong of the affirmative defense.

The affirmative defense also requires that the defendant demonstrate the plaintiff's unreasonable failure to take advantage of preventative or corrective measures provided by the employer. In the instant ease, Hunt's sexual harassment policy, of which plaintiff was aware: "urge[s] [employees who have been harassed] to contact their supervisor, a member of the Personnel Department, Mr. Gary Crawford, or [Alex T. Hunt]." Plaintiff contends that she complied with the spirit of the policy by taking her complaints to her supervisor, Gorum, who clearly was ineffective at stopping the harassment by Thompson. Plaintiff simultaneously contends that during this same time period Gorum was also harassing her. Wyatt acknowledged, however, that she never reported the alleged harassment by Gorum to anyone, even when she was questioned during Hunt's investigation of the November incident, and has not offered any explanation for her silence. She also stated her awareness of the location of management offices to which she could have taken her complaints. Plaintiff continued silence, when viewed in conjunction with Hunt management's swift termination of Thompson and Gorum, is inexplicable. In light

of these facts, we conclude that no jury could find, even taking all of the facts in the light most favorable to the plaintiff, that plaintiff's failure to utilize the procedures Hunt made available to its employees was reasonable. Defendants have satisfied the second prong of the affirmative defense. Plaintiffs claim under Title VII with regard to the pre-November harassment of Thompson and Gorum is dismissed.

Plaintiff also seeks relief under state law for assault, battery, and intentional infliction of emotional distress, premised upon the actions of Thompson and Gorum, who are not parties to this action. Defendants urge that we dismiss these claims, arguing that there exists no basis for finding Hunt vicariously liable for Thompson's conduct. Because we agree with defendants' analysis, plaintiffs state law claims are dismissed.[1]

Under Louisiana law, vicarious liability will attach only if the employee is acting within the scope of his employment and in furtherance of his employer's objectives. *See Baumeister v. Plunkett*, 673 So. 2d 994, 996 (La. 1996). *See id.* at 996. In order to hold an employer vicariously liable for an intentional tort committed in the workplace, the plaintiff must demonstrate that the employee committing the tort was acting with the scope of his duties and also was furthering his employer's business objectives. *See id.* In *Baumeister*, the Louisiana Supreme Court noted that a number of factors should be considered, including: (1) whether the

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[1] Because we find that there exists no basis for vicarious liability, we do not reach the merits of defendants' argument with regard to the merits of plaintiff's Intentional Infliction of emotional distress claim.

tortuous act was primarily employment rooted; (2) whether the act was reasonably incidental to the performance of the employee's duties; (3) whether the act occurred on the employer's premises; and (4) whether it occurred during the hours of employment. *See id.* at 996-97. While not all of the preceding factors must be met, mere commission of the tort on the employer's property during working hours is insufficient to establish liability. *See id.*

Plaintiff has proffered no evidence that convinces this court that it would be appropriate to impose vicarious liability upon Hunt for the actions of Thompson and Gorum. Thompson's sexual harassment of plaintiff was certainly not incidental to the performance of his duties. From our perspective, it appears that Thompson was motivated by personal reasons unrelated to his employment. This view is reinforced by Hunt's prompt termination of Thompson once the incident was discovered. It may be a closer question with regard to Gorum, who covered up the incident in the course of supervising plaintiff, but again, plaintiff failed to demonstrate that the cover-up was incidental to the performance of his duties. In any event, we do not see how either employees' conduct was "primarily employment rooted." As the court reasoned in *Baumeister*, neither Thompson nor Gorum's actions advanced Hunt's business interests, Hunt's business is the making of plywood, and its interests were certainly not advanced by either Thompson or Gorum's reprehensible conduct.

## CONCLUSION

Because we conclude that there exists no issue of material fact as to any of the plaintiff's claims, Hunt's motion

for summary judgment is GRANTED. Plaintiff's cross-motion for partial summary judgment is DENIED. This action is DISMISSED WITH PREJUDICE.

Alexandria, Louisiana
15 February 2001

/s/ _____
F.A. Little, Jr. Chief Judge
United States District Court

No. 02-715

IN THE

# Supreme Court of the United States

ALISHA WYATT,

*Petitioner,*

*v.*

HUNT FOREST PRODUCTS, INC. and
FEDERAL INSURANCE COMPANY,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Did the appellate court correctly apply the *Faragher*[1] affirmative defense to a sexual harassment claim against two supervisors by considering the facts of the case and then analyzing the defense as it applied to each supervisor in turn?

2. Where Petitioner's allegations amount to no more than "cold shouldering" by non-management coworkers and management promptly and adequately addressed Petitioner's two complaints, did the appellate court correctly find that Petitioner failed to establish a prima facie case of constructive discharge or retaliation?

3. Was the appellate court correct in finding that a resignation that occurred seven months after the alleged harassers were terminated was not a tangible employment action barring the *Faragher* affirmative defense?

4. Where the Louisiana Supreme Court has established a four-factor test to determine whether an employee's tortious conduct was within his or her scope of employment and imputable to the employer, and applying that test the Louisiana Supreme Court has repeatedly held that sexual harassment was not within the scope of employment and imputable to the employer, was the appellate court correct in finding that the Respondent was not vicariously liable for the alleged tortious conduct of its employees?

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1. *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Hunt Forest Products, Inc., formerly Hunt Plywood Company, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock. Respondent, Federal Insurance Company, is a wholly owned subsidiary of Chubb Corporation which is publicly traded.

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## STATEMENT OF THE CASE

Petitioner, Alisha Wyatt ("Wyatt"), originally filed this action on November 9, 1995, in Louisiana state court against Hunt Plywood Company, Inc., ("Hunt") alleging only violations of state laws. On January 24, 2000, on the eve of trial, Petitioner sought and was granted leave to amend her complaint to add claims under Title VII and to add Hunt's insurer as a defendant.[2] Hunt subsequently removed the action to the United States District Court for the Western District of Louisiana. The case was decided in Hunt's favor on cross-motions for summary judgment. For purposes of that motion, Hunt assumed arguendo that Wyatt could state a prima facie case of sexual harassment.

On appeal, the Fifth Circuit affirmed in part, reversed in part, and remanded with instructions. The Fifth Circuit found that the district court had correctly dismissed Wyatt's retaliation and state law tort claims. The Fifth Circuit also found that the *Faragher* affirmative defense barred Wyatt's claims for any harassment after late June 1994 but the affirmative defense was not available for any harassment that preceded that date.

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2. Petitioner sought to amend her complaint in response to the state trial court's striking of her demand for jury trial because Petitioner failed to timely post the required jury bond or petition to proceed in forma pauperis.

Under Louisiana law, a plaintiff may join a defendant's insurer without stating an independent claim against the insurer. In this action, all of Petitioner's claims are against Hunt. Accordingly, both Hunt and Federal will be collectively referred to as Hunt in this Opposition.

Wyatt was hired by Hunt on March 17, 1994. At that time, Wyatt received an employee relations booklet that contained Hunt's written discrimination and sexual harassment policies. In relevant part, the policy states: "Employees who feel that they have been harassed are urged to contact their supervisor, a member of the Personnel Department, Mr. Gary Crawford, or me [Alex T. Hunt, Executive Vice President]." Wyatt agreed to familiarize herself with the manual and comply with its provisions. Wyatt was aware of the sexual harassment policy and understood that if she was harassed, she was to report the harassment. Wyatt was initially employed as a utility hand and later promoted to dryer feeder. Wyatt received direction in her job tasks from John Thompson ("Thompson"), a team leader whose official job title was dryer attendant.[3] Both Wyatt and Thompson reported to Donald Gorum ("Gorum"), the dry-end supervisor. Gorum in turn reported to Buddy Rachal ("Rachal"), the dry-end superintendent.

Soon after Wyatt's hire, Thompson began making off-color remarks or comments. This transitioned to a regular occurrence at which point Wyatt told Thompson to stop, and approximately in mid-June 1994, she complained to Gorum about the alleged verbal harassment, which she characterized as "picking." As a result, Gorum spoke to Thompson, and his conduct improved for a period. Further, Wyatt did not subjectively view the comments as sufficient to change a term or condition of employment.

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3. Hunt argued that Thompson was a coworker as opposed to a supervisor because he possessed no power to hire, fire, or discipline and possessed only limited authority to direct Wyatt in the performance of her tasks. The Fifth Circuit found Hunt was estopped from arguing Thompson's status because Hunt admitted that Thompson was a supervisor in its Answer.

> I didn't feel like, OK, like them verbally talking to me, well, talk is one thing but I just feel that if I didn't ever say, yes, then what could happen or what could they do? . . . They can talk until their heads fall off or whatever and, you know, I can take so much of talk as long as there is no – they are not hurting me or anything like that.

In late June or early July 1994, Gorum allegedly began to harass Wyatt. Gorum's harassment included direct requests for sexual acts.[4] Also during this period, Thompson's alleged verbal harassment increased and Thompson allegedly engaged in offensive touching. Wyatt told Thompson and Gorum to stop their conduct but did not report either Thompson or Gorum to anyone above Gorum, despite the complaint procedure in Hunt's sexual harassment policy.

On the night of November 12, 1994, Thompson sneaked up behind Wyatt while she was feeding plywood sheets into the dryer, pulled down her sweat pants exposing her undergarments, and then started to run away.[5] Wyatt, who was embarrassed by the incident, pulled up her pants and left the plant. Thompson attempted to apologize to Wyatt in the parking lot, but she drove away. Wyatt subsequently called Gorum from a pay phone, and Gorum persuaded Wyatt to return to the plant to discuss the matter. Gorum offered to "write up" Thompson for harassment but asked Wyatt to help

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4. At his deposition, Gorum testified that he solicited sex from Wyatt, that she voluntarily consented to engaging in sex with Gorum away from the plant, and that he gave her money afterwards. Wyatt denies having sex with Gorum but claims Gorum offered her money to spend the weekend with him.

5. Wyatt does not allege that Thompson attempted to touch her in a sexual manner or made any comments to her.

cover up the extent of Thompson's conduct to save Thompson's job. Gorum then let Wyatt go home for the evening explaining her absence as an asthma attack. The next day when Wyatt called Gorum and stated she was not coming to work, Gorum offered to excuse Wyatt from work for two days. Wyatt, however, did report to work on Sunday evening and worked her full shift, during which Thompson again tried to apologize.

That Monday morning, Rachal learned that there had been an incident in the plant on the Friday night-Saturday morning shift. He called Wyatt in for questioning before the end of her shift and learned that Thompson had pulled her pants down. Wyatt admits that Rachal treated her reasonably, listened to her side of the story, and asked numerous questions. Rachal immediately reported his findings to Larry Manthei ("Manthei"), Hunt's plant manager. Manthei decided that further investigation was warranted and called Wyatt at home so that he could interview her. Wyatt returned to work and met with Manthei and Roland Simons ("Simons"), Hunt's human resource manager. At that meeting, Manthei and Simons informed Wyatt that Hunt did not tolerate conduct like Thompson's and that they had suspended Thompson and Gorum until an investigation of the incident could be completed. Manthei and Simons also informed Wyatt that if she had any further problems she should inform Rachal. Wyatt admits that Manthei and Simons were polite to her and that they handled the situation in a fair way.

By Tuesday, November 15, 1994, Manthei and Simons had interviewed all the witnesses to the incident. After completing their investigation, Manthei terminated Thompson for inappropriate conduct and Gorum for misrepresenting the facts to management and mishandling

the situation as a supervisor. Wyatt never complained that Gorum had harassed her.

Shortly after Hunt terminated Thompson and Gorum, Wyatt complained to Rachal that two hourly employees made comments that Wyatt was responsible for their terminations and that Wyatt did not have to work anymore because she could get money from the company over the incident. Rachal promptly counseled the employees and both apologized to Wyatt and promised to leave her alone.

Subsequently, Wyatt missed a day of work in February 1995 and did not call in. Kendall Farrar ("Farrar"), Hunt's administrative manager, contacted her at home, at which time Wyatt complained that coworkers were "picking" at her. Farrar offered to have Manthei speak to the employees, and Wyatt agreed to return to work the next day. The day that Wyatt returned to work Manthei told Wyatt that he would not tolerate employees making any inappropriate comments to her and asked her permission to talk to the entire shift at the safety meeting. Wyatt agreed. Manthei then addressed the entire shift and informed them that they were not to make comments to or about Wyatt. Farrar also approached Wyatt and informed her that she should contact him if there were any further incidents.

On May 17, 1995, Wyatt quit her job with Hunt. Wyatt never contacted anyone at Hunt to inform them that she quit; she just stopped coming to work. She did not make any complaints after that safety meeting.

## REASONS FOR DENYING THE PETITION

### I. THE PETITION SHOULD BE DISMISSED UNDER SUPREME COURT RULE 14.4 FOR PETITIONER'S REPEATED MISSTATEMENTS OF THE RECORD AND THE LAW.

#### A. Petitioner Repeatedly Misrepresents the Record to the Court.

Hunt objects to Petitioner's Statement of the Case in its entirety. It is not "a concise statement of the case setting out the facts material to consideration of the questions presented. . . ." Supreme Court Rule 14.1.(g). Rather, Petitioner's Statement is argument that is often either unsupported or directly contrary to the Record. A complete enumeration of all the distortions and misrepresentations in Petitioner's Statement of the Case would require virtually a line-by-line analysis and discussion. A discussion of the more blatant misrepresentations follows.

Petitioner alleges that she repeatedly complained to Gorum and he, in turn, repeatedly complained to Rachal. However, Gorum's deposition testimony was that Wyatt complained on one occasion about Thompson telling her to "bug off," or words to that effect. She did not complain about any sexual comments, and Gorum never relayed Wyatt's complaint to Rachal. (In his deposition, Rachal agrees that he had never received a complaint.) There is no evidence in the Record that Rachal or anyone in upper management was on notice concerning the alleged sexual harassment prior to the pants incident.

Petitioner alleges that "Rachal and Gorum impermissibly forced Petitioner to return to work for Thompson." The Record shows that Gorum allowed Wyatt to leave after the incident and further offered to let her have the next two nights off. Instead, Wyatt voluntarily reported back to work on the Sunday night-Monday morning shift. Rachal first learned of the incident when he came to work that Monday morning and began the investigation. Wyatt did not work for Thompson or Gorum after Rachal first learned of the incident from Wyatt.

Petitioner alleges that Gorum prevented employees from complaining over his head. Again, this is contrary to the Record. Gorum testified that employees routinely went over his head, even though he did not like that.

Petitioner states that Gorum and Thompson continued to harass her after the pants incident. However, she admits in her deposition that after the incident Thompson repeatedly attempted to apologize.

Petitioner also alleges that "Rachal called a meeting with Petitioner and Gorum on or about November 14, 1994, and intimidated and frightened Petitioner by telling her it would be her fault if Thompson was fired." However, in her deposition, Petitioner stated: "Q: I understand that you didn't feel comfortable with Gorum being in the room when you talked to Buddy but other than Gorum's presence, did Buddy treat you reasonably? A: Yes. Basically all he did was ask questions and I answered it. Q: And he listened to your story? Q: Yes."[6]

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6. It must be remembered that Petitioner never made an accusation against Gorum during her employment.

Petitioner continues "Rachal then permitted Gorum to reassign Petitioner to return to work under Thompson's immediate authority where Thompson continued to press Petitioner to not report the truth." In fact, both Gorum and Thompson were immediately suspended and terminated shortly thereafter. Petitioner mischaracterizes the investigation and its results in their entirety.

Petitioner's description of the facts underlying her retaliation claim can only be described as a complete and utter fabrication. At the time of the original investigation Wyatt was permitted to have her mother with her during Manthei's interview. Virtually every member of management encouraged Wyatt to bring any complaints to them. When Wyatt did complain that some coworkers were "picking at" her, Rachal immediately counseled the employees and they apologized to Wyatt and said they would no longer discuss the incident with her. Further, Petitioner admits that she was treated nicely by management throughout this period. And, before Manthei spoke to the shift at a safety meeting, he specifically asked her permission and she said "[r]eally I was all for it because you get everybody at one time instead of, you know trying to hit around and get everybody at different times . . . so I told him that it would be fine with me if that's the way he wanted to do it."

Petitioner also introduces a number of alleged facts concerning other incidents occurring at the plant involving other employees. Petitioner does not allege that she was the "victim" in these incidents or that she was aware of the incidents at the time. Again, these "facts" are rife with mischaracterizations and omit key details such as the deponents' testimony that the conduct between the parties was voluntary, consensual, and conducted in the absence of

management. As such, these stories do little more than demonstrate banter and horseplay in the workplace, albeit some of it inappropriate.[7] These incidents do nothing to prove Petitioner's claims; rather, like many of Petitioner's misrepresentations, they are related in an attempt to inflame the Court.

The Court does not have the Record before it in considering Petitioner's assertions. Nevertheless, the Court can compare Petitioner's Statement of the Case with the facts as found by the district court and the court of appeals. The gulf between the facts as determined by the district and appellate courts and Petitioner's representation of the facts leads either to the improbable conclusion that two federal courts somehow failed to note a significant number of material facts or the more likely conclusion that Petitioner's "facts" are rife with bald assertions and blatant misrepresentations. As the latter is undoubtedly the correct conclusion, the Petition for Writ of Certiorari should be denied under Rule 14.4.

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7. Petitioner also raises Rene Garrett's EEOC charge both to inflame the Court and argue that Hunt was previously made aware of Thompson's and Gorum's harassment. Garrett's charge did not allege sexual harassment. It alleged unfair discipline in retaliation for Garrett's husband having complained that a coworker (not Thompson or Gorum) was asking her for a date. When deposed in this case, however, Garrett stated that Gorum did not like her because she was having an affair with his daughter's husband at the time that Gorum's son-in-law shot and killed Gorum's daughter. The EEOC dismissed Garrett's charge upon a finding of no cause. When notified of Garrett's charge, Hunt promptly investigated and also found it to be without merit. Accordingly, that charge is neither probative nor relevant to Wyatt's claims.

**B. Petitioner Misrepresents the Law.**

Petitioner argues that Hunt should be held liable for the conduct of Gorum and Thompson under state tort law. When Petitioner argued before the Fifth Circuit, Petitioner framed the question as one of vicarious liability for the acts of an agent/employee.[8] In support of her position, Petitioner cites two cases by the Louisiana Supreme Court holding that a plaintiff may state a cause of action for intentional infliction of emotional distress resulting from sexual/racial harassment: *Nichols v. Allstate Ins. Co.*, 765 So.2d 1017 (La. 2000); and *Bustamento v. Tucker*, 607 So.2d 532 (La. 1972).

Wyatt has failed to note Louisiana Supreme Court cases outlining the factors for determining whether the tortious harassing conduct of a coworker or supervisor may be imputed to the employer. These cases, which addressed factually-similar situations, are directly contrary to Wyatt's position as they held that the harassing conduct could not be imputed to the employer. Accordingly, Petitioner had a duty to bring these cases to the attention of the Court. Further, Petitioner cannot claim ignorance as these cases were cited by Hunt in its brief to the Fifth Circuit, and in fact, the Fifth Circuit relied on those cases in affirming the district court's dismissal of Wyatt's tort claims. *See Baumeister v. Plunkett*, 673 So.2d 994 (La. 1996); *LeBrane v. Lewis*, 292 So.2d 216 (La. 1974). Accordingly, this is further justification to dismiss the Petition under Rule 14.4.

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8. In her Petition, however, Wyatt frames the issue in terms implying a negligence standard (i.e., actual knowledge, opportunity to prevent, and failure to prevent). This framing is incorrect as the Louisiana Workers' Compensation statute provides the exclusive remedy for an employee's injury resulting from negligent conduct by her employer. *See* La. R.S. § 23:1032(A).

### C. Petitioner Improperly Disparages a Federal Court in Her Petition.

Petitioner states that "the Fifth Circuit inexplicably and improperly contrived to 'parse' . . . The result of this parsimonious analytical scheme was the dismissal of virtually all of Wyatt's . . . claims under a legal rouse calculated to provide an automatic safe harbor for employers." Petitioner continues by describing the Fifth Circuit panel's decision as cavalier and suggests the decision was based upon "the individual whim of [the panel]" and goes so far as to state that the Fifth Circuit decision must be reviewed "to prevent future injustice to victimized Louisiana citizens from an unjust result improperly obtained in a federal court."

Parties are, of course, free to disagree with the decision of a court. However, Petitioner's remarks cross the line from disagreement to disparagement. Disparagement should neither be permitted nor condoned. Petitioner's improper and uncalled for comments concerning the court serve as further justification for denying the Petition for Writ of Certiorari.

## II. THE COURT'S APPLICATION OF THE FARAGHER AFFIRMATIVE DEFENSE WAS REASONABLE GIVEN THE ASSUMED FACTS.

As previously noted, this case was decided on cross-applications for summary judgment. For purposes of its motion, Hunt assumed arguendo that Wyatt could state a prima facie case of harassment.[9] Hunt argued that even

9. Petitioner repeatedly argues (erroneously) that the lower courts have made numerous factual findings in her favor entitling her to judgment as a matter of law. This ignores the posture of the case and the fact that all inferences were drawn in Petitioner's

(Cont'd)

assuming Wyatt established that she was sexually harassed, Hunt was still entitled to judgment as a matter of law under the *Faragher* affirmative defense.

The district court agreed with Hunt's analysis. However, the Fifth Circuit found that the facts of the case did not permit a simple analysis. Wyatt had alleged harassment by two separate supervisors; and the periods of harassment overlapped but were not entirely concurrent. As Wyatt claims that she reported the harassing conduct of Thompson to Gorum, the senior supervisor,[10] the Fifth Circuit found that Hunt was not entitled to the affirmative defense for that period. However, as Wyatt admits that she never complained about the conduct of Gorum, the court found that Hunt was entitled to the affirmative defense for the period during which she was harassed by Gorum. The court found that the sexual harassment ended with the termination of both supervisors.[11]

Petitioner alleges that the court improperly "parsed" her sexual harassment claim. Petitioner further explains her position by citing *National Railroad Passenger Corp. v.*

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(Cont'd)
favor when the court granted summary judgment in favor of Hunt. Hunt submits that, in fact, Wyatt has failed to prove her case and there are numerous factual disputes that would prevent a grant of judgment in Petitioner's favor.

10. Whether Wyatt actually complained is a disputed issue of material fact that was assumed as true for the motion for summary judgment.

11. Wyatt alleges that she subsequently experienced retaliatory harassment by co-workers but no sexual harassment or supervisor retaliation.

*Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), to support her argument that a sexual harassment claim should be analyzed by the totality of the conduct over the course of time as part of a continuing violation.

Petitioner's analysis is wrong. She confuses the tests for continuing violations and whether the conduct rises to the level of sexual harassment with the affirmative defense. In this case, the continuing violation doctrine and the totality of the circumstances test have no relevance. As the court noted, Hunt has conceded for purposes of the motion for summary judgment that Wyatt has stated a claim for actionable hostile environment for the entirety of the period in question.[12] Accordingly, that is a non issue.

As Hunt conceded that Wyatt experienced sexual harassment, the issue then turned to whether Hunt could establish an affirmative defense. All parties and the courts agreed that the courts were required to apply the affirmative defense outlined by this Court in *Faragher*. It is also undisputed that the Fifth Circuit correctly stated the elements of the affirmative defense. Accordingly, the only issue is if the Fifth Circuit correctly applied that defense given the facts of the case.

As noted, this case contains some rather unique factual elements. Petitioner has alleged harassment by more than

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12. Again, this finding must be considered in light of the posture of the case. Hunt had assumed arguendo that Petitioner had stated a prima facie case and all inferences and facts were drawn in favor of Petitioner. The Fifth Circuit's decision demonstrates that the finding in this regard is not an ultimate finding of fact as the Fifth Circuit remands the case and points out that Petitioner still must prove a prima facie case before the district court.

one supervisor and has further alleged that the harassment was overlapping but not entirely concurrent. Given these facts, the Fifth Circuit applied the affirmative defense separately to each supervisor. The court further held that beginning with Gorum's harassment, it was unreasonable to rely on a complaint to Gorum when the policy provided that Wyatt could bypass Gorum and complain directly to upper management. The Fifth Circuit's analysis is a reasonable interpretation and application of *Faragher* to a fact situation involving multiple supervisor harassers.

Even if the court did err in applying the affirmative defense, that is not sufficient grounds for the grant of a writ of certiorari. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. Wyatt has not raised an issue of sufficient importance to warrant Supreme Court review.

## III. PETITIONER HAS FAILED TO STATE A CLAIM FOR CONSTRUCTIVE DISCHARGE OR RETALIATION.

Petitioner claims that Hunt should be held liable for constructive discharge and retaliation. In support of this issue, Petitioner grossly distorts the facts regarding the alleged retaliatory conduct and management's action. The Record does not support her claim.

As the Fifth Circuit noted, Wyatt's allegations concerning co-worker treatment after Thompson's and Gorum's terminations amount to no more than complaints about shunning or ostracism. Further, management promptly and immediately addressed any complaint that Wyatt made during

this period. Wyatt cites no case law to support a contention that the conduct experienced by Wyatt (as reflected in the Record rather than the overblown assertions in her Petition for Writ of Certiorari) rises to a level that would support constructive discharge or that an employer can or should be held liable for cold shoulder treatment by coworkers that is not encouraged by the employer and, in fact, is actively opposed by the employer. On the other hand, there are numerous cases in which courts have concluded that similar conduct does not rise to the level of retaliation. *See, e.g., McConathy v. Dr. Pepper/7-Up Corp.*, 131 F.3d 558, 564 (5th Cir. 1998) (finding that a supervisor's "insensitive and rude" behavior would not rise to the level of harassment in violation of the ADA); *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir. 1997) (finding that hostility from coworkers including muttering "accidents happen" and stealing tools would not support a retaliation claim); *Hall v. Hebrank*, 102 F. Supp. 2d 844, 863-64 (S.D. Oh. 1999) (finding that "an atmosphere of resentment and systematic rejection" did not support a constructive discharge claim); *Roberts v. Segal Co.*, 125 F. Supp. 2d 545 (D. D.C. 2000) (finding that coworker ostracism and alienation did not rise to level of adverse action or constructive discharge). Similarly, this Court has stated that Title VII was not intended to be a code of general civility. *See Oncale v. Sundowner Sys. Inc.*, 523 U.S. 75, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998).

In short, Wyatt faces two obstacles. The first is imputing responsibility for her coworkers' conduct to Hunt. Hunt promptly responded on the two occasions when Wyatt complained about "picking." After the first complaint the two "offending" coworkers apologized and promised to stop. After the second complaint Wyatt agreed that Manthei's talk

to the crew was appropriate. Accordingly, there is no basis for imputing the coworkers' remarks to Hunt. The second obstacle is her failure to demonstrate any actionable conduct by her coworkers. Here, Wyatt alleges that various coworkers would occasionally ask her about what happened or what she intended to do. Combined, the questions amounted to about one question per day. Based on the above, Petitioner has failed to state a claim, let alone an issue for Supreme Court review.

## IV. PETITIONER'S CLAIM THAT HER ALLEGED CONSTRUCTIVE DISCHARGE CONSTITUTED A TANGIBLE EMPLOYMENT ACTION IS FRIVOLOUS.

In *Faragher*, this Court held that the newly established affirmative defense to sexual harassment claims was not available if the victim was subjected to a tangible employment action. Accordingly, Petitioner alleges that her resignation, seven months after the two alleged harassers were terminated, constituted a tangible employment action depriving Hunt of the affirmative defense. This contention has no support in fact or in law.

This Court has not explicitly ruled whether a constructive discharge can constitute a tangible employment action for purposes of the affirmative defense. But the Court's decision in *Faragher's* companion case, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), strongly implies that a constructive discharge lacks the necessary imprimatur to constitute a tangible employment action. In *Ellerth*, the plaintiff specifically alleged in her complaint that she was constructively discharged. Nevertheless, this Court held that the case should be

remanded to the Seventh Circuit for further consideration because Burlington Industries was entitled to the affirmative defense as "Ellerth has not alleged that she suffered a tangible employment action at the hands of [the harassing supervisor]." Since that time, a number of circuit and district courts have specifically held that a constructive discharge does not constitute a tangible employment action. *See, e.g., Caridad v. Metro-North Commuter RR*, 191 F.3d 283, 294 (2d Cir. 1999); *Turner v. DowBrands, Inc.*, 221 F.3d 1336 (table), 2000 W.L. 924559, at *1 (6th Cir. June 26, 2000); *Seals v. Onodaga County*, 205 F.3d 1324 (table), 2000 W.L. 234446, at *1 (2d Cir. 2000); *Desmarteau v. City of Wichita*, 624 F. Supp. 2d 1067, 1079 (D. Kan. 1999); *Powell v. Morris*, 37 F. Supp. 2d 1011, 1029 (S.D. Oh. 1999); *Scott v. Ameritex*, 72 F. Supp. 2d 587, 594 (D. S.C. 1999); *Alberter v. McDonald's Corp.*, 70 F. Supp. 2d 1138, 1147 (D. Nev. 1999); *Slay v. Glickman*, 137 F. Supp. 2d 743, 748 (S.D. Miss. 2001).

Even if a constructive discharge could constitute a tangible employment action, the facts would not support a claim in this case. Petitioner did not resign until seven months after the harassing supervisors had been discharged. Accordingly, there is no possibility of establishing a link between the alleged tangible employment action and the harassment. The Fifth Circuit properly dismissed this claim with little comment.

## V. PETITIONER'S STATE LAW CLAIMS WERE PROPERLY DISMISSED AS THOMPSON'S AND GORUM'S CONDUCT COULD NOT BE IMPUTED TO HUNT.

In the case below, Petitioner argued that Hunt should be held vicariously liable for the tortious conduct of its supervisors. The Fifth Circuit properly applied the test established by the Louisiana Supreme Court to determine whether an employer is vicariously liable for an employee's tort. This is a four-factor analysis to determine whether the employee was acting within the course and scope of his employment:

> (1) whether the tortious act is primarily employment rooted;
>
> (2) whether the [tortious act] was reasonably incidental to the performance of the employee's duties;
>
> (3) whether the act occurred on the employer's premises; and
>
> (4) whether it occurred during the hours of employment.

*Baumeister*, 673 So.2d at 996-97.

In *Baumeister*, a nurse was sexually harassed and assaulted by her supervisor on the premises of the employer during working hours. Thus, the latter two factors of the applicable four-part test were satisfied. The first two factors, however, were not satisfied. With regard to the second factor,

the Louisiana Supreme Court ruled that the supervisor's tortious conduct was not reasonably incidental to the performance of his employment duties. With respect to the first factor, the Louisiana Supreme Court held that the harassment and assault were not primarily employment-rooted because such conduct did not serve the hospital's business interests to any extent whatsoever. The Court then ruled that the employer was not vicariously liable for the sexual assault of the supervisor.

In deciding this matter, the Fifth Circuit followed the four-factor test and reached the same conclusion as the Louisiana Supreme Court had reached in *Baumeister*. As the cases are clearly analogous, the Fifth Circuit's decision was proper. Accordingly, this does not present an issue worthy of this Court's review.

## CONCLUSION

Wyatt's Petition for Writ of Certiorari fails to comply with the Court's requirements for a clear and accurate statement of the points requiring consideration. Petitioner brazenly makes statements that are either unsupported or contrary to the Record. Petitioner similarly fails to identify relevant points of law and gratuitously disparages the appellate court. Petitioner's conduct is sanctionable and the Petition should be denied on that basis. If the Court chooses to decide the matter on the merits of the Petition, the Petition still should be dismissed as the Record and the law support the Fifth Circuit's decision. Several of the suggested issues are frivolous. At best, the remainder merely suggest that the court of appeals erred either in the application of law or in the determination of fact. Such errors are not significant enough to warrant review by this Court. Accordingly, the Petition should be dismissed.

Respectfully submitted,

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